United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

CARL E. PERSON and CHRISTIAN THEE, :

Plaintiffs-Appellants, :

-against- : 77-1750

NEW YORK POST CORPORATION, :

Defendant-Appellee. :

- x

BRIEF OF DEFENDANT-APPELLEE

PRELIMINARY STATEMENT

This brief is submitted on behalf of appellee New York Post Corporation ("appellee" or "the Post"), defendant below in opposition to the appeal of Carl E. Person ("Person") and Christian Thee ("Thee") ("appellants") from the order and judgment of the United States District Court for the Eastern District of New York (Hon. Edward R. Neaher) denying appellants' motion for a preliminary injunction and granting appellees' motions under Rules 12(b)(6) and 56 Fed. R. Civ. P. to dismiss the Complaint. The District Court's opinion (A 278-304) is reported at 427 F. Supp. 1297.

This action concerns the continuing efforts of appellants, a self-styled "private attorney general" and his client, plaintiffs below, to coerce a private newspaper into

publishing an advertisement soliciting shares in a lawsuit brought by appellants. Although their intent to substitute their editorial judgment for that of the publisher is apparent, appellants attempt to mask this interference with a free press by accusing the newspaper of violations of securities and antitrust laws. This Court should affirm the lower court decision and put an end to this frivolous action.

COUNTER-STATEMENT OF THE ISSUES

1. When appellants failed to satisfy the traditional requirement of showing a probability of success on the merits and irreparable injury and sought relief which would direct the editorial policy of a privately-owned newspaper, and thus violate the First Amendment, was the Court below correct in denying the application for a preliminary injunction?

2. Did the District Court properly dismiss the claims based on the Investment Advisers Act and Section 2 of the Sherman Act?

3. Did the District Court properly grant summary judgment in favor of defendant on the claim under Section 1 of the Sherman Act?

STATEMENT OF THE CASE

Nature of the Case

Person, promoting himself as a "political litigator" (Joint Appendix ["A."] 107) and a "private attorney general" (Appellants' Brief ["Ap. Br."] 40) attempting to establish a "private justice department" (A. 107), represents Thee in a suit against General Mills, Inc. and two other entities. (A. 13-18). Thee decided to sell shares in this suit to finance the cost of litigation. (A. 108). To promote this novel practice, Person, through his legal assistant, submitted a "tombstone" advertisement (a brief announcement of a securities offering) to several New York newspapers, including appellee the Post. (A. 108-109). Two of the Post's employees, exercising their independent judgment, decided that the Post would not accept and publish this tombstone advertisement. (A. 141, 145).

Person sued the Post to compel it to publish the advertisement, and grounded the claim on the following statutes:

(1) the Investment Advisers Act of 1940 (15 U.S.C. §80b-1 et seq.);

(2) the Securities Act of 1933 (15 U.S.C. §77a et seq.);

(3) the Securities and Exchange Act of 1934 (15 U.S.C. §78a et seq.);

(4) the Ku Klux Klan Act of 1871 (42 U.S.C. §1985);

(5) 42 U.S.C. §1986; and

(6) Sherman Act, §§1 and 2 (15 U.S.C. §§1 and 2). (A. 106).

Person moved for a preliminary injunction (A. 33). He thereafter filed a First Amended Complaint (A. 94-104) which contained substantially more allegations concerning an alleged conspiracy in violation of the Sherman Act. Person next filed a Second Amended Complaint adding Thee as party-plaintiff. (A. 106-116).

In response, the Post moved (1) to dismiss the securities, civil rights and antitrust claims, pursuant to Rule 12(b)(1) of the Fed. R. Civ. P. on the grounds that Person and Thee did not have standing to sue; (2) to dismiss the securities, civil rights and monopolization claims, pursuant to Rule 12(b)(6) Fed. R. Civ. P.; (3) to dismiss the securities claims, pursuant to Rule 9(b) Fed. R. Civ. P., on the grounds that fraud had not been pleaded with particularity; and (4) for summary judgment on the restraint of trade claims. (A. 121). The Post's motion was supported by affidavits by Morris B. Abram, Esq. (A. 123-124), a member of the law firm of Paul, Weiss, Rifkind, Wharton & Garrison ("Paul, Weiss"), then attorneys for the Post; Bryon S. Greenberg ("Greenberg") (A. 135-137), General

Manager of the Post; Arthur Brody ("Brody") (A. 138-140), Advertising Director of the Post; Lawrence Goldreyer ("Goldreyer") (A. 141-143), Financial Advertising Director of the Post; and Richard LeLong ("LeLong") (A. 144-146), a salesman in the financial advertising department of the Post.

Person and Thee countered by cross-moving (1) to disqualify the Paul, Weiss firm as attorneys for the Post based on an alleged conflict of interest; (2) for discovery; and (3) for attorney's fees (A. 152-153). Neither their opposition to the Post's motion nor their own motions was supported by evidentiary material beyond their own affidavits.

Judge Neaher granted summary judgment and dismissed all appellants' claims. (A. 278-308). They then moved for reargument and for leave to amend their complaint for the third time (A. 309-310). That motion was also denied. (A. 320-321).

Person and Thee now appeal from judgment (A. 315), but by their brief limit the issues on appeal to (1) the denial of the motion for a preliminary injunction, (2) the Investment Advisers Act claim, and (3) the claims under Sections 1 and 2 of the Sherman Act (Ap. Br. 2-3), thus abandoning their claims under the securities acts and the civil rights laws.

THE FACTS

The events preceding the commencement of this action are simple and substantially uncontested.

In 1975, Person sought a declaratory judgment from a three-judge court validating his proposal to sell shares in law suits and to employ expert witnesses on a contingency basis. (A. 35). The District Court refused to convene a three-judge panel or to rule on plaintiff's claim, since no disciplinary authority had determined the issue. Person v. Association of Bar of City of New York, 414 F. Supp. 139, 142 (E.D.N.Y. 1976).* The record does not disclose whether Person actually obtained any ruling from the Bar Association.

After appellants allegedly had cleared their offering with the Securities and Exchange Commission, Person attempted to place a "tombstone" advertisement (A. 32) for shares in the General Mills suit with seven New York metropolitan newspapers, including the Post. (A. 37). All of the newspapers, with the exception of the New York Daily News (A. 134), refused to publish the advertisement (A. 37). Person singled out the Post to sue, alleging that it conspired with other newspapers, its attorneys, and practically everyone else in the United States since 1908 to restrain trade. (A. 112-113).

*Judge Dooling did hold that New York's disciplinary rule as to hiring expert witnesses on a contingency basis was invalid [Person v. Association of Bar of City of New York, 414 F. Supp. 144 (E.D.N.Y. 1976)], but this Court reversed that order on April 29, 1977. (Docket No. 76-7457).

ARGUMENT

POINT I

THE COURT BELOW PROPERLY DENIED PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

The District Court properly denied the motion for preliminary injunction. (427 F. Supp. at 1301-1302). It refused to grant Person and Thee special rights of access to a private publication to obtain space for questionable advertising.

The District Court's denial of the motion for a preliminary injunction should be affirmed since (1) an individual has no right of access to a privately-owned newspaper, and (2) appellants have failed to satisfy the traditional requirements to obtain preliminary relief. Furthermore, the District Court's discretionary denial of a motion for a preliminary injunction should not be disturbed unless a clear mistake of law has been committed.

A. The First Amendment Bars Compulsory Access To A Privately-Owned Newspaper.

Appellants cannot compel the Post to publish the tombstone advertisement. Nor can they insist that a court prohibit the Post from carrying traditional tombstone ads, merely because the Post has exercised its editorial judgment in refusing to publish this ad. The Court below has aptly set forth the Supreme Court's response to a right-of-

access argument:

> "A court may no more tell a privately owned newspaper what not to print than what to print. Miami Herald Publishing Company v. Tornillo, 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974). That commercial advertising is involved makes no difference. As the Court pointed out in Miami Herald,
>
> 'A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment.
>
> It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.' Id. at 258, 94 S. Ct. at 8240 (footnote omitted and emphasis supplied)." 427 F. Supp. at 1301-1302.

The Miami Herald case concerned a Florida statute which required newspapers to accord political candidates free space in the newspaper to reply to editorial attacks. The Supreme Court declared the statute unconstitutional as violating the newspaper's freedom of the press as safeguarded by the First Amendment. To compel the Post, by means of injunctive relief, to print appellants' advertisement would be to do by judicial fiat what the Supreme Court has expressly forbidden when done by a legislature.

The Miami Herald rationale is as applicable to advertising as to editorial comments. In Mississippi Gay

Alliance v. Goudelock, 536 F. 2d 1073 (5th Cir., 1976), rehear. and rehear. en banc denied 541 F. 2d 281 (1976), cert. denied 45 U.S.L.W. 3704 (April 25, 1977), the decision of the editor of a student newspaper not to publish an advertisement from a gay activist group was sustained on essentially this basis. Even the dissenter conceded that, "Clearly, then, a federal court would have no power . . . to prohibit a non-state newspaper from exercising selective content discrimination in its publication of advertisements." 536 F. 2d at 1084.

In Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973), the Supreme Court held that a television network could not be compelled to accept advertising offered by one of the two major political parties. If a television network which is highly regulated by the Federal Communications Commission, cannot be required to broadcast ads, then surely a private, independent newspaper cannot be so compelled. See Lehman v. City of Shaker Heights, 418 U.S. 298, 303 (1974).

Appellants rely on Pittsburgh Press Company v. The Pittsburgh Commission On Human Relations, 413 U.S. 376 (1973) to support their motion for a preliminary injunction. (Ap. Br. 21). That case involved a local ordinance which prohibited discrimination based on sex and, as applied, banned sex-designated columns for advertisements. Even

though the decision was explicitly confined to the facts before the Court (413 U.S. at 391), the primary distinction for the Court was between "editorial advertisement" and "commercial advertisement" relying on Valentine v. Chrestensen, 316 U.S. 52 (1942). However, in addition to the fact that Pittsburgh Press was decided prior to Miami Herald, the Supreme Court has recently all but eliminated the distinction between protected "editorial speech" and "commercial speech" and severely undercut any precedent value Valentine might have. See Linmark Associates, Inc. v. Township of Willingboro, 45 U.S.L.W. 4441 (May 2, 1977); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975).

The law is now settled: there is no right of access to a privately-owned newspaper, and neither aggrieved persons, courts nor other governmental agencies can dictate the contents of such publications. Associates & Aldrich Company v. Times Mirror Company, 440 F. 2d 133 (9th Cir., 1971); Chicago Joint Board, Amalgamated Clothing Workers of America, ALF-CIO v. Chicago Tribune Company, 435 F. 2d 470 (7th Cir., 1970), cert. denied, 402 U.S. 973 (1971); Gore Newspapers Company v. Shevin, 397 F. Supp. 1253 (S.D. Fla. 1975), aff'd 2 Med. L. Rptr. 1818 (5th Cir., 1977); Brown v. Murphy, 355 F. Supp. 416 (S.D.N.Y. 1973).

B. Appellants Have Failed To Satisfy Traditional Criteria For Securing A Preliminary Injunction.

Even if the Post did not have the protection afforded by the First Amendment, appellants are not entitled to prevail, for they have not made the showing required by this Court.

> "The settled rule is that a preliminary injunction should issue only upon a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." Gulf & Western Industries, Inc. v. The Great Atlantic & Pacific Tea Co., 476 F. 2d 687, 692-693 (2d Cir. Mar. 12, 1973); Checker Motors Corp. v. Chrysler Corp., 405 F. 2d 319 (2d Cir.), cert. denied, 394 U. S. 999, 89 S. Ct. 1595, 22 L. Ed. 2d 777 (1969)." Sonesta International Hotels Corporation v. Wellington Associates, 483 F. 2d 247, 250 (2d Cir. 1973). (Emphasis in original.)

Since appellants based their motion for a preliminary injunction solely on the Investment Advisers Act (the other two grounds on which the motion below was granted are not pursued here, the Securities Act of 1933 and the Securities and Exchange Act of 1934)(Ap. Br. 38-41), they must clearly establish that they will probably succeed or raise serious questions under the Investment Advisers Act. As discussed in Point II, infra, appellants cannot sustain such a claim since (1) the Post is specifically exempted from coverage under the Act, and (2) appellants have no standing under the

Act.

Since "the balancing of hardships test of Sonesta necessarily includes the showing of irreparable harm" [Triebwasser & Katz v. American Telephone & Telegraph Company, 535 F. 2d 1356, 1359 (2d Cir., 1976)], appellants have also failed to satisfy the second requirement for a mandatory injunction.

Additionally, appellants have failed to demonstrate any irreparable injury or that a balancing of hardships decidedly favors them.

They claim that unless the Post is ordered to publish the tombstone ad, they will be unable to solicit purchases of shares in their suit. (Ap. Br. 23). However, they do not support their overbroad conclusions with any evidentiary matter. Thus, nowhere do appellants describe, e.g. (1) what steps have been taken to employ other methods of solicitation, such as mailings, or (2) why they would automatically obtain favorable results from a single tombstone ad in the Post when the ad run in the New York Daily News, a newspaper with almost ten times the Post's circulation, produced few responses (A. 92, 222); or (3) what responses they did receive. In the absence of such evidence, the Court below properly refused to assume the role of a marketing analyst to verify the wholly speculative nature of appellants' claim of the hypothetical success of a tombstone ad published by the Post.

Appellants' perception of "public policy" (Ap. Br. 24) cannot substitute for a "clear showing" of the irreparable harm which is a requirement for granting a preliminary injunction, particularly where, as in this instance, it would be a mandatory order equivalent to the final relief sought which would, in effect, end the case.

It is well-settled law that the granting of preliminary injunctive relief is within the sound discretion of the District Court which discretion will not be disturbed except for abuse or a clear mistake of law. Triebwasser & Katz v. American Telephone & Telegraph Company, supra, 535 F. 2d at 1359. See Brown v. Chote, 411 U.S. 452, 457 (1973). The District Court made no mistake of law is dismissing the cause of action based on the Investment Advisers Act, and clearly did not abuse its discretion in denying the motion for a preliminary injunction. See Robert W. Stark, Jr., Inc. v. New York Stock Exchange, Inc., 466 F. 2d 743 (2d Cir., 1972). Thus, its denial of the motion for a preliminary injunction should be affirmed.

POINT II

APPELLANTS HAVE NO CAUSE OF ACTION UNDER THE INVESTMENT ADVISERS ACT

The Court below properly dismissed Person's frivolous claim under the Investment Advisers Act of 1940. Not only is it readily obvious that the Post is exempted from coverage of the Act as a "bona fide newspaper", but appellants have no standing to assert such a claim since the Act was never intended to benefit them.

A. The Post Is Not An Investment Adviser

Section 202(a)(11) of the Act defines an "investment adviser" as:

> "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include . . . (D) the publisher of any bona fide newspaper . . . of general and regular circulation; . . . ."
> 15 U.S.C. §80b-2(a)(11) (Emphasis supplied).

Person's extended discussion of the Act (Ap. Br. 24-38) slides over this direct and explicit exemption for "bona fide newspapers".

Appellants concede (A. 72) that the Post has been published daily except Sunday since it was founded

in 1801, and that it clearly has all the attributes of a bona fide newspaper of general and regular circulation. Nor do they serious contend (beyond their bold conclusions) that the Post is not primarily concerned with reporting news, sports and features to a general audience to whom it provides principally non-financial advertising.

Yet, apparently they claim (Ap. Br. 30) that by merely publishing some tombstone advertisements, the Post automatically relinquishes its "bona fide" status as a newspaper, and becomes obligated to register as an "investment adviser" under the Act. The absurdity of this argument is patent.

Appellants rely solely on and extensively quote (Ap. Br. 32-35) from this Court's opinion in Securities and Exchange Commission v. Wall Street Transcript Corporation, 422 F. 2d 1371 (2d Cir. 1970), cert. denied, 398 U.S. 958 (197). That case, where this Court directed the enforcement of a subpoena issued by SEC in its investigation of a "tout sheet" called "The Wall Street Transcript" ("WST"), is clearly not in point. Unlike the Post, this Court noted that WST primarily consisted of reprinted reports assessing various specific securities issues. 422 F. 2d at 1373 n. 2, 1378.

Here, appellants go no further toward establishing their contention that the Post is primarily a vehicle for distributing investment advice than their shrill allegations. See "Applicability of Investment Advisers Act to Certain

Publications", Release No. 2A-563, January 10, 1977, 4 CCH Fed. Sec. L. Rptr. ¶56,157. Also, for a discussion of a financial sheet granted "bona fide" status, see FINANCE MAGAZINE, 1971-72 CCH Fed. Sec. L. Rptr. ¶78,536 (SEC 1971). As the Court below eloquently stated:

> "The plain truth is that newspapers of general circulation like the Post are not meant to be subject to the Investment Advisers Act and no amount of casuistic ratiocination can make it otherwise." 427 F. Supp. at 1303.

B. Appellants Have No Standing Under The Investment Advisers Act.

Even if they did not have to overcome the impenetrable barrier of the Post's exemption, Person and Thee cannot maintain a cause of action under the Act since they cannot be included among the intended beneficiaries of the Act. Despite Person's self-appointment as a "private attorney general" (Ap. Br. 40) and general defender of the public good, Congress, in enacting the Investment Advisers Act decided that only "persons who paid for investment advice needed protection from dishonest and self-dealing advisers." Bolger v. Laventhal, Krekstein, Horwath & Horwath, 381 F. Supp. 260, 263 (S.D.N.Y. 1974).

Although this Court has now held that an implied private right of action for damages exists under the Act [Abrahamson v. Fleschner, 1976-77 CCH Fed. Sec. L. Rptr.,

¶95,889 (2d Cir., 1977)], appellants clearly have not "paid for" any "investment advice" here and consequently could not have the benefit of any such private right of action.

Recognizing their inability to demonstrate standing under the provisions of the Investment Advisers Act, appellants argue that their nebulous status as "private attorneys general" enable them to show requisite interest for standing under any or all of the statutes relied upon below. On the contrary, appellants cannot merely claim that they represent the public at large; they must be individually harmed by an alleged violation of a particular statute.

> "[T]he standing question in its Art. III aspect 'is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.' Warth v. Seldin, 422 U.S. 490, 498-499 (1975) (emphasis in original). In sum, when a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justicability of the claim, the plaintiff has show an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation." Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976). (Emphasis in original).

There must be a "concrete injury" (Id. at 40) which "fairly can be traced to the challenged action of the

defendant". (Id. at 41). "[U]nadorned speculation [as to the nature and cause of the injury] will not suffice to invoke the federal judicial power." (Id. at 44). Appellants rely only on speculation as to any injury. Not only are they barred from grounding their suit "on the legal rights or interests of third parties" [Warth v. Seldin, 422 U.S. 490, 499 (1975)], but they have also failed to show any connection between a purported violation of the Investment Advisers Act or the Sherman Act (see Point III, infra) and a concrete injury to themselves.

The Supreme Court has explained the necessity for showing "concrete injury" to attain standing:

> "Without such limitations -- closely related to Art. III concerns but essentially matters of judicial self-governance -- the courts would be called upon to decide abstract questions of side public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." Id. at 500.

Thus, the court below properly dismissed appellants' claim under the Investment Advisers Act.

POINT III

THE COURT BELOW PROPERLY DISMISSED APPELLANTS' MONOPOLIZATION CLAIM

Appellants argue, not that the Court below was incorrect in its dismissal of the monopolization claim, but that they were caught by surprise and did not have an adequate opportunity either to brief the point or to amend their complaint for the third time. (Ap. Br. 52-53). Although the allegations in the Second Amended Complaint as to a Section 2 violation are difficult to discern, (A. 106, 114) the Post clearly placed these allegations in issue in its Notice of Motion which included a request for dismissal of the "monopolization claims on the grounds that plaintiffs have not stated a claim upon which relief can be granted". (A. 121) In addition, the Post strenuously argued in favor of dismissing the Section 2 claim in both its main and reply memoranda of law. (A. 275)* Self-evidently, appellants' failure to brief these issues in the Court below results from a calculated decision not to do so and not from inadequate notice. Moreoever, Judge Neaher's reasons for dismissing the Section 2 claim are compelling:

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*Only one page of the memoranda is available in the Joint Appendix. However, the Court can refer to pages 34-35 in the Post's main memorandum and pages 13-14 in the reply memorandum, both contained in the full record, for the complete argument for dismissal of the Section 2 claim.

> "The complaint fails to allege either that the Post possesses monopoly power, see United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed. 2d 778 (1966) or has attempted to monopolize with a dangerous probability of success, see Swift & Co. v. United States, 196 U.S. 375, 25 S.Ct. 276, 49 L.Ed. 518 (1905). Nor are any facts supportive of the claim or of personal injury to plaintiffs alleged. The monopoly claim is thus manifestly without merit."
>
> 427 F. Supp. at 1308

Appellants have also failed to allege that the Post had a "specific intent" to monopolize required to sustain a cause of action either for (1) an attempt to monopolize, or (2) conspiracy to monopolize. International Railways of Central America v. United Brands Company, 532 F. 2d 231, 239 (2d Cir. 1976, cert. denied, _____U.S._____; Bowen v. New York News Inc., 522 F.2d 1242, 1257-1258 (2d Cir. 1975), cert. denied, 425 U.S. 936 (1975). One might add that to have granted permission to replead a third time would have been a futile act since, it is clear, appellants could not in good faith make the requisite allegations.

The court below was correct in dismissing the Section 2 claim.

POINT IV

THE COURT BELOW PROPERLY GRANTED THE POST'S MOTION FOR SUMMARY JUDGMENT ON THE RESTRAINT OF TRADE CLAIM

Appellants' restraint of trade argument really amounts to two characters in search of a cause of action. After floundering

about attempting to point to conspiracies among the Post's employees and among the newspapers in New York City, appellants accuse the Post's former attorneys of being the actual conspirators. (Ap. Br. 41-45)* The antitrust claims are patently frivolous and were obviously thrown into Person's 2nd Amended Complaint solely as a makeweight. Under any conspiracy theory, appellants have failed to state a claim upon which relief can be granted or to raise any material issues of fact to defeat summary judgment or even to obtain discovery under F.R.C.P. Rule 56 (f).

A. Appellants Fail To Raise Any Material Issues Of Fact To Sustain Their Claim Under Section 1 Of The Sherman Act

Appellants appear to concede, as well they must, that Judge Neaher has correctly stated the elements to plead and prove a cause of action for concerted refusal to deal under §1 of the Sherman Act, 427 F. Supp. at 1306, fn. 9

Establishing a "conspiracy, combination or agreement among the Post and others is a burden much too onerous for appellants to sustain. It is incontrovertible that the Post

*In view of this Court's decision in Person v. Association of the Bar, supra, it would appear that this Court joins the ranks of the conspiracy (A. 113).

could not, as a matter of law, conspire with its own officers, directors, employees, or agents to violate §1 of the Sherman Act. Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc., 531 F.2d 910, 916-917 (8th Cir. 1976) ("Morton Buildings"); Joseph E. Seagram and Sons, Inc. v. Hawaiian Oke and Liquors, Ltd., 416 F.2d 71, 82 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970). See Bowen v. New York News Inc., supra, 522 F.2d at 1252.

Appellants attempt on this appeal to isolate a corporation's attorneys from the umbrella protection accorded to corporate officers and employees under §1 of the Sherman Act. They seek to establish this distinct category for attorneys by relying on a case which considered attorneys not in the context of a Section 1 conspiracy claim, but in discussing an attempt to monopolize under Section 2 of the Sherman Act. In Tillamook Cheese Dairy Association v. Tillamook County Creamery Association, 358 F.2d 115, 118 (8th Cir. 1966), the court stated:

> "The individuals through whom a corporation acts and who shape its intentions can be held liable on a charge of attempted monopolization. [Citations omitted.]
>
> "We do not believe that this rule can be applied to the counsel for a corporation whose activity is brought into question, if the role of the counsel was only that of a legal adviser. This would be true even if, as counsel, he mistakenly advised corporate officers that a particular course of conduct would not violate section 2. But if he goes beyond that role and, acting by himself or jointly with others, makes policy decisions for the corporation, then he subjects himself to liability for attempted monopolization as in the case of any executive officers of the company performing a similar function." * (Emphasis supplied).
>
> *[Footnote on following page.]

However, even if this rationale were applied in the Section 1 context to provide a hypothetical basis for a claim of conspiracy between the Post and its attorneys, appellants have not come forward with even a scintilla of evidence to show that the Paul, Weiss firm has conducted itself in any manner other than as a thoroughly professional legal adviser. Person has rambled on with outlandish, mendacious and conclusory allegations that Paul, Weiss conspired with the Post to deprive his client of advertising space merely because Paul, Weiss also happens to represent a defendant in another suit in which Person represents the plaintiffs. (Ap. Br. 41-43) The absurdity of these unsupported allegations is apparent. Nowhere do appellants document their charge that Paul, Weiss controlled the Post's actions for the benefit of another client, while the Post's affidavits, uncontroverted by appellants, demonstrate that the Post, not Paul, Weiss developed advertising policy applied here.

In addition to Tillamook Cheese, the only other two cases cited by appellants (Ap. Br. 42-43), are (1) United States v. Buzzard, CCH Trade Cases ¶61,034 (10th Cir. 1975) involving an attorney for a trade association of independent retailers, not a corporation; and (2) Economy Carpets Manufacturers and Distributors, Inc. v. Better Business Bureau of Baton Rouge, Inc., CCH Trade Cases ¶116,182 (La. Ct. of App. 1976), which involved a state court's interpretation of a Louisiana antitrust law, not a federal court's view of Section 1 of the Sherman Act. Neither is pertinent.

Appellants' attempt to discern some illegal conspiracy among major metropolitan newspapers is likewise devoid of merit. Judge Neaher below appropriately commented that this misguided effort "must be taken to be an afterthought, a collateral and purely makeweight argument." 427 F. Supp. at 1307.

It is well-settled law that a unilateral business decision not to deal with someone is not violative of Section 1 of the Sherman Act. Bowen v. New York News Inc., supra; Ark Dental Supply Co. v. Cavitron Corp., 461 F.2d 1093 (3d Cir. 1972); Anaya v. Las Cruces Sun News, 455 F.2d 670 (10th Cir. 1972). Indeed more than conscious parallelism is required to sustain a §1 claim for concerted refusal to deal. Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.; 346 U.S. 537 (1954); Michelman v. Clark - Schwebel Fiber Glass Corporation, 534 F.2d 1036 (2d Cir. 1976) cert. denied _____ U.S._____. Modern Home Institute, Inc. v. Hartford Accident and Indemnity Company, 513 F.2d 102, 110 (2d Cir. 1975); Kreager v. General Electric Co., 497 F.2d 468 (2d Cir. 1974), cert. denied, 419 U.S. 861 (1974).

The simple truth is that appellants have failed to evidence a single fact (as opposed to conclusory allegation) to demonstrate any concerted activity among the newspapers. The

uncontroverted affidavits of LeLong, Goldreyer, Brody and Greenberg unequivocally state that (1) none of the affiants discussed with anyone from any other publication whether or not to publish Person's tombstone ad (A. 136-137, 139, 142-143, 145-146); (2) the decision not to publish the ad was based solely on the independent business judgment of LeLong and Goldreyer (A. 138, 141, 145); and (3) three of the four affiants, each having over thirty years of service at the Post, did not recall any other rejection of a tombstone ad (A. 136-137, 139, 142).

Since appellants have not come forward with any evidence to controvert the Post affidavits, mere reliance on the second amended complaint or conclusory allegations is insufficient. First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289 (1968); Modern Home Institute, Inc. v. Hartford Accident and Indemnity Company, supra; Stern & Stern, Inc. v. Criterion Jewelry Casting Co., 1976-1 Trade Cases, ¶ 60,770 (S.D.N.Y. 1976). See Heart Disease Research Foundation v. General Motors Corp., 463 F.2d 98 (2d Cir. 1972). Person and Thee have been unable to come forward with any evidence showing concerted activity for one simple reason: no such conspiracy ever existed.*

*It would seem critical for the effectiveness of any such "conspiracy" to include as a participant the largest selling newspaper in the New York metropolitan area: The New York Daily News. Person seeks to explain away the obvious inconsistency in his conspiracy theory (the Daily News published his tombstone ad on July 23, 1976 [A. 134]) by claiming the News is not read by people in the market for shares in the Thee lawsuit. (A 155, 222). However, appellants neither define that market nor explain why they even submitted the ad to the News in the first place.

It is also odd that appellants never sued the other eleven parties to the so-called "conspiracy". (A. 109) Indeed, the decisions by the other publications not to publish the ad reinforces the sound, yet independent, business judgment of LeLong and Goldreyer.

Appellants' invocation of Rule 56 (f) cannot be viewed other than as an artifice to stall and delay the final day of reckoning. They understand that mere reliance on the conclusory allegations in both the Second Amended Complaint and their affidavits cannot raise material issues of fact in opposition to the affidavits submitted by the Post's employees. See First National Bank of Arizona v. Cities Service Co., supra; Beal v. Lindsay, 468 F.2d 287, 291 (2d Cir. 1972). Consequently, they are pleading for this Court's permission to embark on a fishing expedition to seek some support for their unfounded claim. Such a speculative journey is not envisioned by Rule 56 (f). As stated in Searer v. West Michigan Telecasters, Inc., 381 F.Supp. 634, 643 (W.D. Mich. 1974), affirmed without opinion, 524 F.2d 1406 (6th Cir. 1975):

> "Such further discovery, although permitted in appropriate cases under Rule 56 (f), is unwarranted in this case, where it is clear that it would not be directed at filling a specific evidentiary gap, but rather would consist of blind groping, undertaken in the hope of finding something to which this suit could be anchored."

A motion for summary judgment, even in an antitrust case, cannot be defeated by sheer conjecture. United States v. Donlon, 355 F. Supp. 220, 225 (D. Del. 1973), affirmed without opinion, 487 F.2d 1395 (3rd Cir. 1973).

Appellants cannot merely invoke Rule 56 (f) by stating generally that the facts to oppose the motion are within the exclusive control of the Post. Rule 56 (f) prescribes a specific responsibility for the opposing party.

> "Thus, an affidavit properly submitted under Rule 56(f) has the effect of either postponing entry of summary judgment or precluding it altogether. A party seeking the shelter of Rule 56(f) must do so in good faith, however, and must conclusively justify his inability to respond adequately or not at all to the movant's affidavits:
>
> > '[T]he opposing party should present his affidavit showing that the knowledge or control of the facts is exclusively or largely with the moving party and describe his attempts to obtain those facts. The mere averment of exclusive knowledge or control of the facts by the moving party is not adequate; the opposing party must show to the best of his ability what facts are within the movant's exclusive knowledge or control; what steps have been taken to obtain the desired information pursuant to the discovery procedures under the Rules; and that he is desirous of taking advantage of these discovery procedures. [6 J. Moore, Federal Practice ¶56.24 at 2876 2d ed. 1974) (footnote omitted).]'
>
> Accord, School Board of Okaloosa County v. Richardson, 332 F. Supp. 1263, 1269 (N.D. Fla. 1971). See Robin Construction Co. v. United States, 345 F.2d 610, 613-14 (3d Cir. 1965); Peckham v. Ronrico Corp., 7 F.R.D. 324, 333 (D.P.R. 1947), rev'd on other grounds, 171 F.2d 653 (1st Cir. 1948); 10 C. Wright & A. Miller, Federal Practice and Procedure §2741 at 734-35 (1973)."
>
> Willmar Poultry Co. v. Morton-Norwich Products, Inc., 520 F.2d 289, 294 (8th Cir. 1975), cert. denied 424 U.S. 915 (1975).

Judge Neaher found that: "A searching examination of plaintiff's papers reveals a total failure to make a showing adequate to sustain the test of Rule 56(f)." 427 F. Supp. at 1307. Appellants' statement pursuant to the District Court's Local Rule 9(g), the statement of facts in dispute indicates that appellants sought to prove that a conspiracy resulted from (1) the discussions among the Post and other publishers as to the refusal to publish appellants' tombstone (A. 231-232) and (2) the advertising managers from the metropolitan newspapers met as directors of the Better Business Bureau to discuss "acceptability of advertising offered by Competing Small Businesses". (A. 234) As the District Court observed, such a proffer was futile since the employees of the Post, identified by appellants' 9(g) statement, terminated their active employment with the Post by 1970, and thus could not have discussed Thee's tombstone; and (A. 271-272) the Post resigned as a member of the Better Business Bureau on December 31, 1971. (A. 272) Appellants offered no evidence to dispute these easily verifiable contentions nor have they explained their failure to do so.

In connection with the disputed "fact" that the group discussions among newspapers were "to arrange a boycott of any tombstone advertising by clients of Ferson" (A. 232), Judge Neaher appropriately noted that appellants had taken inadequate steps to set forth (1) their attempts to obtain the necessary facts to support their allegations, (2) what they would

do if their motion for Rule 56(f) discovery were granted, and (3) what the reaction of other metropolitan newspapers was to the submission of the Thee tombstone ad. 427 F. Supp. at 1307-1308.

Although appellants seek to excuse their inadequate papers by claiming that the Rule 56(f) standard is a "debatable technical requirement" (Ap. Br. 50), they still would not be able to demonstrate the existence of any material* issues of fact even if they had been permitted discovery. (A. 137, 139-140, 143, 146) Any discovery would not alter those uncontroverted facts.

> "Rule 56(f) is not a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious. A party invoking its protections must do so in good faith by affirmatively demonstrating why he cannot respond to a movant's affidavits as otherwise required by Rule 56(c) and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact. Where, as here, a party fails to carry his burden under Rule 56(f), postponement of a ruling on a motion for summary judgment is unjustified."
>
> Willmar Poultry Company v. Morton-Norwich Products, Inc., supra, 520 F. 2d at 297.

The Court below, in its sound discretion, denied

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*"Appellants' laundry list of purported issues of fact (A. 226-235) contain statements utterly irrelevant to the determination of the existence of an illegal conspiracy. Facts must be material to defeat summary judgment.
Searer v. West Michigan Telecasters, Inc., supra, 381 F. Supp. at 634.

appellants' motion for Rule 56(f) discovery. That determination should not be overruled without a showing of abuse. Lehigh Valley Industries, Inc. v. Birenbaum, 527 F.2d 87 (2d Cir. 1975); Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972), cert. denied 411 U.S. 966 (1972).

Equally significant is that appellants have also not come forward with any evidence to show that they were injured at all and that the injury directly resulted from the allegedly illegal conduct. They have not shown that their securities offering failed, that their action against General Mills, Inc. et al is not continuing, that it is being obstructed for lack of money and that any injury results from the Post's alleged conspiracy.

Moreover, Person individually could suffer no injury from any refusal to publish, concerted or otherwise, since he was representing Thee on a contingency basis, and his fee, based on the ultimate success of the General Mills action, would be far too speculative to be considered "actual injury". See Searer v. West Michigan Telecasters, Inc., supra, 381 F. Supp. at 641.

Appellants must also submit some evidence to show that any injury was directly caused by the alleged group boycott. Morton Buildings, supra, 531 F.2d at 918; GAF Corporation v. Circle Floor Co., Inc., 329 F. Supp. 823, 827 (S.D.N.Y. 1971), affirmed, 463 F.2d 752 (2d Cir. 1972), cert. dismissed, 413 U.S. 901 (1973); Ryals v. National Car Rental System, Inc., 404 F. Supp. 481 (D. Minn. 1975); America's Best Cinema Corporation v. Fort Wayne Newspapers, Inc., 347 F. Supp. 328 (N.D. Ind. 1972).

> "This court has held that for an antitrust plaintiff to have standing "[t]here must be a causal connection between an antitrust violation and an injury sufficient for the trier of fact to establish that the violation was a 'material cause' of or a 'substantial factor in the occurrence of damage." Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 187 (2d Cir. 1970), cert. denied, 401 U.S. 923, 91 S.Ct. 877, 27 L.Ed. 2d 826 (1971); see Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed.2d 777 (1962); SCM Corp. v. Radio Corp. of America, 407 F.2d 166 (2d Cir.), cert. denied, 395 U.S. 943, 89 S. Ct. 2014, 23 L. Ed.2d 461 (1969)."
>
> Bowen v. New York News Inc., supra, 522 F. 2d at 1255.

Accordingly summary judgment for the Post was proper.

B. This Case Is Appropriate For Summary Judgment

Although courts have been reluctant to grant summary judgment in antitrust cases (see Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 [1962]), this Court recently stated that "baseless antitrust claims may be dismissed before trial". George C. Frey Ready-Mixed Concrete Inc. v. Pine Hill Concrete Mix Corp., Docket No. 75-7698, at 3775 (2d Cir. May 6, 1977). Certainly, summary judgment has been granted in antitrust cases. E.g., First National Bank of Arizona v. Cities Service Co., supra; Sound Ship Building Corp. v. Bethlehem Steel Company (Incorporated), 533 F.2d 96 (3rd Cir. 1976) cert. denied _____ U.S. _____; Solomon v. Houston Corrugated Box Co., Inc., 526 F.2d 389 (5th Cir. 1976); Modern Home Institute, Inc. v. Hartford Accident and Indemnity Company, supra;

Akron Presform Old Company v. McNeil Corporation, 496 F.2d 230 (6th Cir. 1974) cert. denied, 419 U.S. 997 (1974); Saenz v. University Interscholastic League, 487 F. 2d 1026 (5th Cir. 1973); Kugler v. Aamco Automatic Transmissions, Inc., 460 F. 2d 1214 (8th Cir. 1972). Summary judgment has even been granted prior to any discovery. GAF Corporation v. Circle Floor Co., supra; Stern & Stern, Inc. v. Criterion Jewelry Casting Co., Inc., supra.

> "The purpose of a summary judgment is to screen out sham issues and "to discover whether one side has no real support for its version of the facts," (Community of Roquefort v. William Faehndrich, Inc. 303 F.2d 494, 498 (2d Cir. 1962), and "summary judgment cannot be defeated by the vague hope that something may turn up at trial." Perma Research and Development Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969); see Radio City Music Hall Corporation v. United States, 135 F.2d 715 (2d Cir. 1943); Jones v. Borden Company, 430 F.2d 568, 5th Cir., July 15, 1970."
>
> Beckman v. Walter Kidde & Company, 316 F. Supp. 1321, 1324 (E.D.N.Y. 1970, affirmed, 451 F.2d 593 (2d Cir. 1971), cert. denied, 408 U.S. 922 (1972).

This case is one of the baseless and frivolous antitrust actions envisioned by this Court in the recent Ready-Mixed Concrete case. There is no possible reason to reverse the lower court's grant of summary judgment.

CONCLUSION

The Memorandum and Order below should be affirmed in all respects.

Dated: New York, New York
June 13, 1977

Respectfully submitted,

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Of Counsel

Service of 2 copies of this within
Brief is admitted this
13 day of June 1977

[signature]
ATTORNEY FOR Plaintiffs = Appellants

6/13/77

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